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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY EUGENE PHILLIPS,

Defendant and Appellant.

C079327

(Super. Ct. Nos. CRF14245,
CRF15145)

Defendant Timothy Eugene Phillips pleaded no contest in separate cases for false imprisonment and assault with a deadly weapon. He contends (1) defense counsel rendered ineffective assistance when he did not present evidence or argument in favor of defendant's motion to withdraw his plea; (2) the trial court erred in denying his motion to withdraw his plea; (3) the court erred by not striking a strike prior as agreed in the plea bargain; (4) the court erred by not awarding him presentence credit for time spent in flash incarceration; and (5) we should remand to allow the trial court to exercise its discretion under Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1, 2.) (SB 1393) to determine whether to strike enhancements imposed for two serious felony priors.

Except to remand for resentencing under SB 1393, we disagree with defendant's contentions and affirm the judgment.

FACTS AND PROCEEDINGS

In 2014, defendant tied his brother to a chair with rope and duct tape to keep him from going out. (Sup. Ct. case No. CRF-14-245.) For this, he pleaded no contest to one count of false imprisonment. (Pen. Code, § 236 [statutory section references that follow are to the Penal Code].) The trial court granted probation subject to serving 90 days in jail. Defendant also waived the right to receive credit for time served in flash incarceration.

In 2015, defendant stabbed his brother with a knife in the head. (Sup. Ct. case No. CRF-15-145.) He pleaded no contest to one count of assault with a deadly weapon. (§ 245, subd. (a)(1).) As part of the plea bargain, he admitted one of two strike priors and two serious felony priors, and he and the prosecution stipulated he would be sentenced to state prison for a term of 18 years. At the same time, defendant admitted violating his probation in the false imprisonment case due to the new offense.

Defendant later moved to withdraw his no contest plea in the assault case. The trial court denied the motion and sentenced defendant to 18 years in prison, calculated as follows: the upper term of four years, doubled, plus five years for each of the serious felony priors. The court also terminated probation in the false imprisonment case and imposed the mid term of two years, to run concurrently.

The trial court issued certificates of probable cause in both cases.

DISCUSSION

I

Ineffective Assistance of Counsel

Defendant contends his trial counsel rendered ineffective assistance by not making argument or introducing evidence to support his request to withdraw his plea in the assault case. We disagree. The record indicates counsel had a reasonable basis for his tactic.

A. *Background*

As mentioned above, defendant pleaded “no contest” in the assault case. Defendant initialed his plea form to indicate he was not taking any medication that affected his ability to understand the form and the consequences of his plea, he had not recently consumed any alcohol or drugs, and he was not suffering from any medical condition. In taking defendant’s plea, the trial court asked him if he had recently consumed drugs or alcohol. Defendant said he was not then on drugs or alcohol and he had not been the night before. Defendant also informed the court he was not taking any medications.

At sentencing, defendant moved to withdraw his “no contest” plea. Making the motion, defense counsel stated: “Your Honor, while I don’t believe there is any legal cause, in discussing the matter with [defendant], [defendant] has intimated he would like to withdraw his plea [Defendant] intimated to me he was under the influence of a controlled substance at the time of the entry of [the] plea.” The trial court noted defendant had initialed on the plea form he was not taking any medications, but it continued the matter in order to obtain a transcript of the plea hearing.

At the continued hearing, the trial court found no grounds to support defendant’s motion, and denied it. It did so because defendant said at the plea hearing he was not on drugs or alcohol at the time of the plea or the day before, and he was not taking any medications. The trial court did not ask defense counsel for argument, and counsel did not raise any argument or introduce any evidence in support of the motion.

B. *Analysis*

Defendant claims his counsel’s failure to raise argument or produce evidence constituted ineffective assistance. He asserts counsel had no plausible explanation for his tactic, and that he suffered prejudice from counsel’s decision.

To establish ineffective assistance of counsel, defendant must show (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced him. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 691-692 [80 L.Ed.2d 674].) If defendant makes an insufficient showing on either component, the claim fails. (*People v. Holt* (1997) 15 Cal.4th 619, 703.)

"If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

Defendant has not met his burden. There is no evidence that counsel was asked to explain his tactic but failed to do so. The record also does not suggest counsel's performance was obviously inadequate, or that there could be no satisfactory explanation for his not arguing the motion. To the contrary, the record shows counsel chose not to argue a motion which the evidence did not support. "Although criminal defendants are entitled to competent representation in the presentation of a motion to withdraw a plea, appointed counsel may properly decline to bring a meritless motion." (*People v. Brown* (2009) 175 Cal.App.4th 1469, 1472.)

In order to succeed on a motion to withdraw his plea, defendant had the "burden to produce evidence of good cause by clear and convincing evidence." (*People v. Wharton* (1991) 53 Cal.3d 522, 585; Pen. Code § 1018.) " " "Good cause" means mistake, ignorance, fraud, duress or any other factor that overcomes the exercise of free judgment and must be shown by clear and convincing evidence.' [Citation.]" (*People v. Dillard* (2017) 8 Cal.App.5th 657, 665.) "A plea may not be withdrawn simply because the

defendant has changed his mind. (*In re Brown* [(1973)] 9 Cal.3d [679,] 686.)” (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.)

Counsel likely recognized it would be difficult to establish good cause with clear and convincing evidence. Twice, orally and in writing, defendant informed the trial court he was not under the influence of alcohol, drugs, or medication at the time he entered his no contest plea. According to counsel, when defendant sought to withdraw his plea, he only “intimated” to counsel after the plea that he was under the influence when he entered his plea. Counsel knew that withdrawal of the plea was left to the trial court’s sound discretion, and an intimation of intoxication would not rise to the level of clear and convincing evidence to overcome defendant’s unequivocal declarations of his sobriety.

We “indulge a strong presumption that counsel’s acts were within the wide range of reasonable professional assistance.” (*People v. Dennis* (1998) 17 Cal.4th 468, 541.) On this record, we cannot say counsel’s decision not to argue or present evidence in favor of defendant’s withdrawing his plea was unreasonable under professional norms. Defendant thus cannot establish ineffective assistance.

II

Denial of Motion to Withdraw Plea

Defendant contends the trial court denied him due process and abused its discretion when it did not give him the opportunity to present evidence of intoxication in support of his motion to withdraw his plea. The burden to present evidence, however, rested on defendant. To be relieved of his earlier plea, he had to present the “requisite proof that the ends of justice will be subserved by permitting him to change his plea from guilty to not guilty.” (*People v. Brotherton* (1966) 239 Cal.App.2d 195, 201.) Defendant did not do this. He made no offer of any testimony or evidence to support his intimation of intoxication nor did he request the opportunity to do so. Because he did not satisfy his burden, the trial court did not abuse its discretion in denying the motion.

III

Not Striking a Strike

The plea bargain in defendant's assault case called for defendant to admit one of two strike priors. The trial court would strike the other strike prior. The trial court approved the plea and sentenced defendant according to the terms of the plea bargain, but it did not specifically strike the second strike prior.

Defendant contends the court erred by not striking the second strike. He argues we should remand the matter so the trial court may dismiss the strike prior or he may withdraw his plea. We disagree, as defendant has suffered no prejudice.

Under case law rule, "defendants are estopped from complaining of sentences to which they agreed." (*People v. Hester* (2000) 22 Cal.4th 290, 295.) "Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process." (*Ibid.*, original italics.)

Defendant received the benefit of his bargain. Although the trial court omitted striking the strike, the omission had no prejudicial effect on defendant. He bargained for an 18-year sentence predicated on the dismissal of one of the strikes, and that is what he received. Defendant would be in no better position had the trial court said it was striking the strike. We reject defendant's claim of error for lack of prejudice.

IV

Custody Credit

Section 4019 prohibits a trial court from awarding presentence custody credits for periods of flash incarceration served by persons who violate their terms of parole or

postrelease supervision. (§ 4019, subd. (i).) As a condition of his *probation* in the false imprisonment case, defendant waived any presentence credit attributable to serving up to 10 days of flash incarceration.

Defendant later served 10 days of flash incarceration in county jail for violating probation. When the court eventually sentenced him in the false imprisonment case, it awarded him 194 days of credit. He contends he was entitled to an additional 10 days of credit for his period of flash incarceration because section 4019's prohibition against awarding credits for days served in flash incarceration applies only to persons on parole or postrelease supervision and not to persons on probation.

Whether section 4019's prohibition applies to probationers is of no moment. Defendant expressly waived any right he may have had to credit for days in flash incarceration. "The California Legislature has given trial courts broad discretion to devise appropriate conditions of probation, so long as they are intended to promote the 'reformation and rehabilitation' of the probationer. (Pen. Code, § 1203.1, subd. (j).)" (*In re Luis F.* (2009) 177 Cal.App.4th 176, 188.) It is well-established in a variety of circumstances that defendants may waive custody credits, including future custody credits. (*People v. Johnson* (2002) 28 Cal.4th 1050, 1054-1055, and cases cited therein; *People v. Jeffrey* (2004) 33 Cal.4th 312, 318-319.) "Because a defendant may give up the statutory right to custody credits, a trial court has discretion to condition a grant or extension of probation upon a defendant's express waiver of past and future custody credits." (*People v. Johnson*, at p. 1055.)

"As the United States Supreme Court has observed, ' "[t]he most basic rights of criminal defendants are . . . subject to waiver." ' (*United States v. Mezzanatto* (1995) 513 U.S. 196, 201 [130 L.Ed.2d 697].) This is consistent with the well-established rule allowing ' "[a] party [to] waive any provision . . . intended for his benefit." ' (*Ibid.*; accord, Civ. Code, § 3513; *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.)" (*People v. Johnson*, *supra*, 28 Cal.4th at p. 1055) " 'Generally, permitting waiver " 'is

consistent with the solicitude shown by modern jurisprudence to the defendant's prerogative to waive the most crucial of rights.' [Citation.]" [Citation.] A defendant may waive a right that exists for his or her own benefit, where such waiver is not against public policy.' (*People v. Farnam* (2002) 28 Cal.4th 107, 146.) A defendant may waive a right accorded by statute so long as the statute does not expressly preclude waiver. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1209-1211.)" (*People v. Campbell* (2004) 119 Cal.App.4th 1279, 1288.)

Nothing in section 4019 affects defendant's waiver of any right he may have had to earn presentence credit for flash incarceration while on probation, and defendant does not challenge the waiver on any other ground. The court thus did not abuse its discretion when it refused to award him 10 days of credit for his time in flash incarceration.

V

SB 1393

Defendant asks us to remand to allow the trial court to exercise discretion newly granted it by SB 1393 to strike his serious felony priors used to support five-year enhancements under section 667, subdivision (a)(1). Prior to SB 1393's adoption, the law prohibited courts from striking felony priors used for purposes of the section 667 enhancement. (Former § 1385, subd. (b).) SB 1393, effective January 1, 2019, removed that prohibition. In a supplemental brief, defendant contends SB 1393 is retroactive and applies to all cases not yet final as of its effective date, such as this case. The Attorney General did not file an opposition on this point. We agree with defendant.

Absent evidence to the contrary, amendments to statutes that reduce the punishment for a crime or vest in trial courts the discretion to impose a lesser penalty, such as SB 1393, apply to all defendants whose judgments are not final as of the amendment's effective date. (*In re Estrada* (1965) 63 Cal.2d 740, 742; *People v. Garcia* (2018) 28 Cal.App.5th 961, 972.) When it enacted SB 1393, the Legislature did not

indicate it intended the legislation to apply prospectively only. (*Ibid.*) The act thus applies retroactively to this case.

We are required to remand in instances such as this “unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] . . . enhancement” even if it had the discretion. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) The record here contains no such evidence. The trial court reviewed the record surrounding defendant’s plea, denied his motion to withdraw the plea, and sentenced him according to the terms of the plea bargain without further comment. We thus remand for the court to consider striking the two serious felony priors that support the enhancements imposed under section 667, subdivision (a)(1).

DISPOSITION

The matter is remanded for resentencing for the trial court to consider whether it should strike either or both serious prior felonies on which the enhancements imposed under section 667, subdivision (a)(1), are based. In all other respects, the judgment is affirmed.

HULL, J.

We concur:

RAYE, P. J.

DUARTE, J.